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No. 83-904

# In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
*Petitioner,*

vs.

KENNETH M. JOHNSON,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN E. SHOOP, *Prosecuting Attorney of Lake County, Ohio*
*Counsel of Record*
ROBERT W. LAFORCE
JUDSON J. HAWKINS
*Assistant Prosecuting Attorneys*
47 North Park Place
P.O. Box 490
Painesville, Ohio 44077
(216) 357-2683
*Attorneys for Petitioner*

ALBERT L. PUROLA
38052 Euclid Avenue, #201
Willoughby, Ohio 44094
(216) 951-2323
*Attorney for Respondent*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## ARGUMENTS IN RESPONSE TO BRIEF OPPOSING PETITION FOR CERTIORARI

**I. In reviewing a Petition for a Writ of Certiorari the United States Supreme Court looks to the opinion of the State Court decision in a "syllabi" state in order to resolve whether a substantial Federal question had been passed upon in the State Court, and the judgment will not be allowed to stand where the opinion accompanying the syllabi erroneously placed the concurrence of its author upon compulsion by Federal Law.**

The Court's method of reviewing a Petition for a Writ of Certiorari is not restricted to a tunnel vision look at only the syllabi of the State Court opinion. The deter-

mination rests on whether the whole record shows that the decision is based on a substantial Federal ground or on an independent State ground.

This Court has held that there is no reason why the Court should not look to the opinion of the State Court whose decision was brought up for review, in order to resolve whether any Federal question had been passed upon in the State Court. *Murdock v. Memphis,* 20 Wall. 590, 22 L. Ed. 429 (1874).

Respondent improperly cites *Beck v. Ohio,* 379 U.S. 89 (1964) for the proposition that the law of Ohio appears only in the syllabus of the opinion which is prepared by the Court itself. *Beck, supra,* at 93, clearly does not decide the question of whether the opinion should be looked to as well as the syllabi to determine the basis for the State Court decision. The Court "puts aside" that question.

The Court did, however, decide the issue at a later date in *Perkins v. Benguet Consolidated Mining Company,* 342 U.S. 437 (1952). Where the syllabus of the Ohio Supreme Court standing alone might have meant that the decision rested solely upon state law, and where the syllabus was accompanied by an opinion which erroneously placed the concurrence of its author upon compulsion by Federal Law, and where the report of the case did not disclose to what extent, if any, the other members of the Court may have shared the view expressed in the opinion, this Court held: First, that the opinion was an official part of the report of the case; Second, although the Ohio law recognized that the syllabus constituted the official opinion of the Court the law still required that the syllabus be read in the light of the facts and issues of the case; and Third, that the judgment would not be allowed to stand where the opinion accompanying the syllabus erro-

neously placed the concurrence of its author upon compulsion by Federal Law. *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952).

In the present case the syllabus of the Ohio Supreme Court is accompanied by an opinion which relies on a misapplication of the Double Jeopardy Clause. The report of the case does not disclose to what extent, if any, the other members of the Court may have shared the view expressed in the opinion. The opinion was erroneously based upon compulsion by Federal Law. The Court misinterpreted the United States Supreme Court's pronouncement in *Blockburger v. United States*, 284 U.S. 299 (1932) which establishes a rule of statutory construction. The *Blockburger* rule was used erroneously to determine legislative intent where other tests should have been used to discern such intent. This Court wrote in constructing its decision in *Blockburger* that:

> "The *Blockburger* test is a 'rule of statutory construction' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz v. United States*, 450 U.S. 333 (1981).

As in *Perkins, supra*, at 443, the opinion of the Ohio Supreme Court should not be allowed to stand.

The decision of the Ohio Supreme Court rests on a misinterpretation of Federal law rather than solely on State law. Respondent's attempt at limiting this Court's review to the syllabi alone is not supported by law and the mere proposing of such an argument suggests that in looking past the syllabi one can only conclude that the Supreme Court of Ohio's decision rests upon substantial Federal questions.

**II. The reference in the second syllabus of the State of Ohio's opinion in this case to the Double Jeopardy Clause is itself enough to establish that the judgment rests on a substantial Federal question and is therefore reviewable by the United States Supreme Court.**

A writ of certiorari should be granted even if this Court looks to only the syllabi. Respondent's statement, "the two syllabi of the present case make no reference to any provisions of the federal constitution . . ." is untrue. Rather, the second syllabus directly refers to the Double Jeopardy Clause of the Fifth Amendment:

> "The offenses of murder, R.C. 2903.02, and involuntary manslaughter, R.C. 2903.04, share the common element of causing the death of another and are distinguishable only by the offender's mental states. *The prohibition against double jeopardy requires* that in any one killing, the offender may be convicted of one or the other of the offenses but not both." *State of Ohio v. Johnson*, 6 Ohio St. 3d 420 (1983).

The reference to the Double Jeopardy Clause in the second syllabus of the opinion at bar may be viewed in two possible ways. Either the State Court rendered the decision based upon Federal constitutional grounds, or the decision rests on State grounds and the State Court felt compelled by its understanding of Federal constitutional considerations to construe State law in the manner it did. Whichever is the case, the Supreme Court will decide the Federal issues. *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-631 (1973); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

## CONCLUSION

For all the foregoing reasons Petitioner prays that this Court grant the petitioned for Writ of Certiorari.

Respectfully submitted,

JOHN E. SHOOP, *Prosecuting Attorney of Lake County, Ohio*
*Counsel of Record*
ROBERT W. LAFORCE
JUDSON J. HAWKINS
*Assistant Prosecuting Attorneys*
47 North Park Place
P.O. Box 490
Painesville, Ohio 44077
(216) 357-2683
*Attorneys for Petitioner*

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